

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY ELTON TATE,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 267948

Wayne Circuit Court

LC No. 05-001027-01

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of a firearm during the commission of a felony, MCL 750.227b, and attempted armed robbery, MCL 750.529. He was sentenced to two years' imprisonment for felony-firearm, to be served consecutive to fourteen to sixty months' imprisonment for attempted armed robbery. He appeals as of right. We affirm defendant's convictions but remand for the correction of his presentence information report.

Defendant first argues on appeal that the trial court erred in denying his motion to adjourn the trial to allow the co-defendant the ability to be available to testify.¹ We disagree.

A trial court's decision on a motion for a continuance is discretionary and reviewed for an abuse of discretion. *In re NEGP*, 245 Mich App 126, 134; 626 NW2d 921 (2001).

On the first day of testimony, defense counsel noted that he wanted the co-defendant to testify on defendant's behalf but that "[t]he problem is this. Just so the record is clear, as the court just brought out, there were some concerns after consulting with the co-defendant, after consulting with his attorney reneged on his offer to come in and testify on behalf of Mr. Tate." The trial court and defense counsel then discussed at length the potential pitfalls of having the

¹ Contrary to the prosecution's assertion, we do not believe defendant waived this issue. Defense counsel moved for an adjournment and never agreed with the trial court's decision to deny the motion. Counsel sought admission of co-defendant's statement only as an alternative to procuring co-defendant's actual presence at trial. If defendant were to challenge the admission of statement into evidence at trial, we would agree with the prosecution that the issue has been waived. But defendant is not making that argument.

co-defendant testify including that the co-defendant might assert his Fifth Amendment right and refuse to testify at all. Defense counsel stated, "...but the direction we're going is he [co-defendant] made a statement to the police already and he indicated that there was another individual, a Darnell Hopkins, who had the weapon."

Noting that the co-defendant would likely be considered unavailable because of the Fifth Amendment concerns, the trial court denied defendant's request for an adjournment to procure the co-defendant's presence at trial but ruled that it would allow his statement to police to be admitted into evidence under MRE 404(b)(3) as a statement against penal interest. The prosecution objected, but the trial court overruled the objection and the statement was admitted and read into evidence. The jury was able to hear that the co-defendant told police that a third person, not defendant, was the one who had a gun during the robbery.

In deciding whether to grant a continuance, the trial court should consider whether the defendant: (1) asserted a constitutional right; (2) had a legitimate reason for asserting the right; (3) had been negligent; and (4) had requested previous adjournments. *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). To invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show good cause. MCR 2.503(B)(1). Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003).

Here, defendant did assert a constitutional right, for a legitimate reason, was not negligent, and had not requested any previous adjournments. *Lawton*, *supra* at 348. However, we conclude that the trial court did not abuse its discretion in denying the adjournment because defendant has not demonstrated prejudice as a result of the decision. *Coy*, *supra* at 18-19. The option of having the co-defendant's statement to police read into evidence was defense counsel's idea and likely benefited the defense. That is, it allowed the jury to hear the co-defendant's exculpatory statement without subjecting defendant to potentially damaging testimony during cross-examination of the co-defendant. Thus, defendant has not shown he was prejudiced by the trial court's ruling.

Defendant next asserts he is entitled to resentencing because the trial court relied on inaccurate information from the presentence information report (PSIR) in imposing sentence. We disagree that the case should be remanded for resentencing, but agree that the PSIR must be corrected.

"We review the sentencing court's response to a claim of inaccuracies in defendant's PSIR for an abuse of discretion." *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

A "[d]efendant has the right to the use of accurate information at sentencing, and a court must respond to allegations of inaccuracies." *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). In responding to an allegation, a court may "determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Spanke*, *supra* at 648. If a court chooses the last option, it "must clearly indicate that it did not

consider the alleged inaccuracy in determining the sentence.” *Id.* at 649. A court must correct or delete any information from the PSIR it finds inaccurate or irrelevant before sending it to the Department of Corrections. *Id.* If the court finds that the challenged information is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. MCL 771.14(6); MCR 6.425(D)(3)(a).

Here, the transcript reveals that defense counsel noted the inaccuracy contained in the PSIR. The trial court acknowledged the inaccuracy and then discussed its receipt of letters attesting to defendant’s good character before imposing sentence. However, the trial court did not mention defendant’s alleged drug use when handing down its sentence. We conclude, based on the trial court’s discussion with defense counsel, that the court accepted that defendant did not use marijuana “on a regular basis.” Therefore, resentencing is not necessary. However, because the trial court did not rely on the challenged information in imposing defendant’s sentence, defendant is entitled to have the information stricken from the PSIR. MCL 771.14(6); MCR 6.425(D)(3)(a); *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001).

We affirm defendant’s convictions and sentences, but remand for the ministerial task of correcting the PSIR. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens